

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Aspen
PL-I

31539

FILE:

B-218200.2

DATE: June 24, 1985

MATTER OF:

Haskell Corporation--Request for
Reconsideration

DIGEST:

1. Protest that contracting agency should have rejected bid as nonresponsive on the basis of information submitted to the agency after bid opening is denied. It is a fundamental rule of formal advertising that the responsiveness of a bid must be determined from the bid submission itself and not on the basis of post-bid-opening submissions.
2. Protest that bid of competitor in line for award was in fact mistaken, even though contracting agency had accepted the competitor's verification of its bid price, will not be considered by GAO. Only the contracting parties (here, the government and the firm in line for award) are in a position to assert rights and to bring forth all the necessary evidence to resolve mistake in bid questions.

Haskell Corporation (Haskell) requests reconsideration of our decision in Haskell Corporation, B-218200, Mar. 6, 1985, 85-1 C.P.D. ¶ 283, wherein we dismissed as untimely its protest against any award of a contract to Engineering Materials Co., Inc. (Engineering Materials), under invitation for bids No. DLA500-84-B-1588, issued by the Defense Industrial Supply Center (DISC) for the supply of plain hexagon, nickel-copper alloy nuts.

Because of the conflicting evidence concerning timeliness, discussed below, we have considered the merits of the protest and deny it.

DISC solicited bids for the supply of nuts made of "NICKEL COPPER ALLOY, CLASS B," material. When bids were opened on August 23, 1984, it appeared that Engineering Materials had submitted the low bid of \$0.459 per nut for the quantity desired by DISC, while Haskell had submitted the second low bid of \$0.517 per nut. After application of a labor surplus area preference in favor of Haskell, Engineering Materials' bid price was calculated as \$0.46909 per nut for purposes of evaluation.

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However, by letter of September 4, Haskell protested to DISC any award to Engineering Materials, questioning whether the supplies to be furnished by that firm would be of non-domestic origin and whether the raw material being used was of class "A," rather than the required class "B," nickel-copper alloy. As we pointed out in our prior decision, DISC understood Haskell to be protesting that Engineering Materials' bid was "based on the furnishing of foreign material or Class A material" and Haskell subsequently confirmed to our Office that it had questioned "whether Engineering Materials had based its bid on quotations for Class A alloy."

On November 20, the contracting officer "denied" Haskell's protest that Engineering Materials' bid was based on furnishing foreign or class "A" material. Nevertheless, according to information supplied by Haskell in support of its initial protest, counsel for DISC "reopened" and agreed "to further investigate" the matter during a December 3 conversation with Haskell. By letter of January 31, 1985, however, the contracting officer determined to "affirm my denial" of Haskell's protest.

Haskell then filed a protest with our Office within 10 working days of receiving a copy of the contracting officer's January 31 decision. Haskell alleged that a mistake existed in Engineering Materials' bid and that the bid was nonresponsive because it was "based upon" the use of nickel-copper alloy not meeting the specifications.

Section 21.2 of our Bid Protest Regulations, 4 C.F.R. § 21.2 (1985), provides that protests must be filed within 10 working days after the basis for the protest is known or should have been known, whichever is earlier. Where the protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the initial protest.

Since it appeared from Haskell's protest to our Office that DISC's November 20 denial of Haskell's initial protest constituted initial adverse agency action, we found that the firm's failure to protest to our Office within 10 working days of learning of that decision rendered the subsequent protest to our Office untimely. We noted that the fact that Haskell continued to pursue the matter with DISC in the hopes that the agency, upon further investigation and reflection, would change its adverse action did not alter the requirement that a subsequent protest to our Office be filed within 10 working days of actual or constructive

notice of initial adverse agency action. See Pierce Coal Sales International--Request for Reconsideration, B-218003.2, Feb. 25, 1985, 85-1 C.P.D. ¶ 236; Allis-Chalmers Corp., B-214388, Mar. 16, 1984, 84-1 C.P.D. ¶ 320.

In its request for reconsideration, however, Haskell offers a more detailed account of the December 3 conversation. According to Haskell, counsel for DISC then disclosed to Haskell "for the first time" that Engineering Materials' bid was based on a subcontractor's quotation for "Class B Alloy Type 400." When informed that "Type 400" refers to class "A" alloy rather than to the more expensive class "B" alloy required under the specifications, counsel for DISC allegedly not only reopened the matter for further investigation, but also advised Haskell to "disregard" the contracting officer's November 20 decision and indicated that Haskell need not appeal to our Office since the award of the contract was still under consideration.

Haskell argues that the advice to disregard DISC's November 20 decision meant that that decision no longer constituted initial adverse agency action. It further contends that, in any case, the "new information" as to the subcontractor's quotation formed the basis for a new protest, a protest Haskell allegedly made on December 3. Haskell maintains that the agency took no adverse action on this new protest until the contracting officer issued his decision of January 31 and, therefore, its protest filed within 10 days thereafter is timely.

DISC, on the other hand, disputes Haskell's version of events. DISC, which believes that the conversation occurred on November 30, maintains that counsel for DISC merely indicated that he would ask the contracting officer to delay the award pending a further investigation. The agency denies that counsel ever advised Haskell not to file a protest with our Office. DISC contends that counsel first informed Haskell that the protest would be reopened on December 20, the same day he first contacted the subcontractor regarding the quotation and, based upon information from the subcontractor, advised the contracting officer to reopen the protest. In support of its version, DISC has provided our Office with purportedly contemporaneous memoranda describing the conversations in question. Based upon this scenario, it is DISC's position that Haskell's failure to protest within 10 days of the denial of its agency protest on November 20, 1984, results in Haskell's protest being untimely.

We need not, however, resolve this dispute as to timeliness, since it is clear to us, based upon the record developed when determining whether to reconsider our initial decision, that Haskell's grounds for protest are either without merit or of a type which we will not consider on the merits.

As indicated above, Haskell argued in its protest to our Office that Engineering Materials' bid was nonresponsive because it was based on a quotation for a different nickel-copper alloy than that required under the solicitation. Haskell points out that the subcontractor did not in fact even manufacture class "B" alloy until sometime after it submitted the quotation questioned by Haskell. Haskell further suggests that the inconsistency in the quotation between the class "A" and the "Type 400" designations rendered Engineering Materials' bid ambiguous and thus nonresponsive.

We note, however, that Engineering Materials' bid did not include the subcontractor's quotation. Instead, this quotation first came to DISC's attention after bid opening when Engineering Materials offered it in response to DISC's request that the firm support the verification of its bid price with a quotation from a supplier of nickel-copper alloy. Engineering Materials in fact took no exception in its bid to the solicitation requirement for class "B" nickel-copper alloy. Since it is a fundamental rule of formal advertising that the responsiveness of a bid must be determined from the bid submission itself and not on the basis of post-bid-opening submissions, it would have been improper for DISC to reject Engineering Materials' bid as nonresponsive on the basis of the subsequently supplied subcontractor's quotation. See Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 C.P.D. ¶ 645.

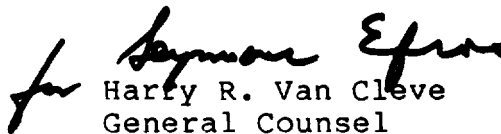
Haskell also argued that Engineering Materials' bid price was mistaken because it was based on a quotation for class "A" nickel-copper alloy rather than the more expensive class "B" alloy required under the specifications.

DISC, however, points out that not only has Engineering Materials never alleged a mistake in its bid but, on the contrary, the firm has in fact verified its bid price. DISC emphasizes that the subcontractor's quotation, dated over 2 months after bid opening, was prepared only to respond to the contracting officer's post-bid-opening request for a

quotation from a supplier. DISC accepts Engineering Materials' explanation that its bid price was instead based upon Engineering Materials' "raw material cost estimates" and also included a 10-percent allowance for possible increases in raw material or other manufacturing costs.

Our Office has previously held that only the contracting parties (here, the government and the firm in line for award) are in a position to assert rights and to bring forth all the necessary evidence to resolve mistake in bid questions. See Libby Corporation, B-218367.2, Apr. 10, 1985, 85-1 C.P.D. ¶ 412; Riverport Industries, Inc., B-218122, Feb. 14, 1985, 64 Comp. Gen. __, 85-1 C.P.D. ¶ 201; Bill Conklin Associates, Inc., B-210927, Aug. 8, 1983, 83-2 C.P.D. ¶ 177; cf. Southwest Truck Body Company--Request for Reconsideration, B-208660.2, Dec. 28, 1982, 82-2 C.P.D. ¶ 585. Here, Engineering Materials has consistently denied that its bid was mistaken and DISC has finally accepted the firm's verification of its bid price. Since the bid prices were only 12.6 percent apart and nothing in the bid itself indicated an obvious error, see R.P. Sita, Inc., B-217027, Jan. 14, 1985, 85-1 C.P.D. ¶ 39, we are unwilling to sustain Haskell's protest in this regard.

The protest is denied.


for Harry R. Van Cleve
General Counsel